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United States of America

In the

Supreme Court of the United States

In the Matter of
THE ELLESS COMPANY, a Michigan corporation,
Debtor

FRANK W. BLAIR, LOUIS H. CHARBONNEAU, and LUCIUS TETER, Trustees under Trust Agreement for Stock of Whittier Corporation dated as of May 1, 1938, and WHITTIER CORPORATION and HARRY W. JONES and HAROLD M. SHAPERO,
Petitioners,
vs.
JOHN C. FINAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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vs.

JOHN C. FINAN,
Respondent.

(All figures in parenthesis refer to Printed Record in Court below.)

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States:

Petitioners hereby apply for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review an order therein entered May 2, 1949, pursuant to an opinion of the same date not yet reported.

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

(A) Opinion of Court of Appeal

Such opinion held (1) that the Federal District Court had jurisdiction to terminate a voting trust created under a Plan of Reorganization confirmed under the provisions of Section 77 B of the United States Bankruptcy Act, and to determine the rights of the Voting Trustees and voting trust certificate holders to vote the stock represented by such certificates distributed in 1938; (2) that the District Judge should have enjoined the Trustees from voting the stock, even though voluntarily left by voting trust certificate holders with the Trustees notwithstanding Sections 32 and 34 of the Michigan Corporation Code, expressly providing that voting trustees shall have the right to continue voting such stock after termination of the voting trust until voting trust certificate holders withdraw and register their stock in their own names; and (3) that such power and determination of the rights of certificate holders could be adjudicated and determined in a proceeding in which such certificate holders were not parties, without violating the due process clause of the Federal Constitution.

The primary grounds for requesting review are (1) that the decision of the Court of Appeals for the Sixth Circuit that the District Court has such jurisdiction is in conflict with decisions of other Courts of Appeal, especially of the Second Circuit, on the same matter; (2) has decided an important question of the construction of Section 77 B of the Bankruptcy Act (now Chapter 10 of the Chandler Act) as to the limits of the jurisdiction of the Bankruptcy Court after confirmation and

consummation of the Plan of Reorganization and distribution of the securities thereunder, which has not been, but should be, settled by this Court; (3) has so far departed from the usual course of judicial proceedings by determining rights of voting trust certificate holders to voluntarily permit Voting Trustees to continue to vote their stock after termination of the trust, without such certificate holders being made parties to the proceeding as to call for the exercise of the power of supervision of the Supreme Court; and (4) has decided an important question of the local Michigan law in conflict with local law, and with the express terms of the Michigan statute, by ignoring the same, although specifically called to the attention of the Court below.

There is no question of fact, since all facts were stipulated in the Courts below.

(B) Relationship of Parties

Respondent Finan filed his petition in the United States District Court for the Eastern District of Michigan on May 20th, 1947, in the 77 B Bankruptcy reorganization proceedings of the Elless Company (99-121). At that time he owned 48 shares of stock in Whittier Corporation, created pursuant to the Plan of Reorganization adopted in that proceeding, and owned voting trust certificates representing 972 shares of such stock under the voting trust created pursuant to such Plan of Reorganization (99) which was confirmed by the Court April 12, 1938 (42). Such Plan of Reorganization (7-41) provided for the organization of a new corporation (Petitioner, Whittier Corporation) to take over the principal asset of the Debtor, the Whittier Hotel, worth two million dollars, and for the exchange of first mortgage bonds, upon which the Debtor was obligor, secured by a first mortgage upon the

Whittier Hotel, for voting trust certificates representing shares of stock in the Whittier Corporation (31). The petitioners, Frank W. Blair, Lucius Teter, and Louis H. Charbonneau, are Trustees under such voting trust. It is the rights of voting trust certificate holders to continue to leave their stock with the Trustees which are involved in this litigation.

(C) The Voting Trust Agreement and Extension thereof

The voting trust agreement (48-77) confirmed and approved by the District Court in April, 1938, had these provisions here important: (1) that the trust agreement would continue until May 1, 1946, unless sooner terminated by the Trustees or the Court (68), but that at any time after May 1, 1942, certificate holders had the unrestricted right to withdraw and obtain their stock with the attendant voting rights (70); (2) that the trust agreement could be amended, altered, or modified by action of the Trustees, with the approval of the Court, if notice thereof were given certificate holders, unless holders of more than 25% of such certificates objected thereto within twenty days after such notice (72, 73); (3) that if any portion of the trust agreement were invalid, the agreement should be construed as if the invalid portion had been eliminated (73); and (4), that if any jurisdiction reserved to the District Court therein were invalid, holders of certificates would be entitled, on request, to obtain their stock, whether before May 1, 1942 or not (74).

On February 28, 1946, Edward J. Moinet, United States District Judge, approved an amendment extending the voting trust from May 1, 1946, to May 1, 1951 (91-94). Respondent Finan, though a certificate holder at that time, made no objection thereto (112, 151). Only 7 certificate holders holding certificates representing 93 shares ob-

jected to such amendment (151). Eleven hundred twenty-nine certificate holders holding certificates representing over 16,000 shares consented to the amendment by authorizing an endorsement of such amendment to be placed upon their certificates (159-160).

(D) Proceedings in District Court

Over a year later, on May 20, 1947, Finan filed his petition (99-121) to set aside the amendment, extending the voting trust upon the grounds (1) that the order of the Court approving the extension of the voting trust was void and beyond the jurisdiction of the Court, and (2) was in violation of the Ten Year Voting Trust Statute, being Section 34 of Act 327 P. A. 1931 as amended, Mich. Stat. Ann., Par. 21.34 (105, 106). Such petition prayed that the Court determine that the voting trust had terminated and that an injunction issue restraining the voting trustees from continuing to vote the stock in the voting trust (109, 110).

Answers and objections were filed by petitioners to respondent's petition upon the grounds among others (1) that the District Court had no jurisdiction to terminate the trust (184); (2) that in any event, the Bankruptcy Court had no jurisdiction to determine the matter without making such certificate holders parties, and to do so would be to deprive them of their rights without due process of law (184); (3) that in any event the extension of the voting trust was valid as to those certificate holders who had consented and agreed to the extension (172, 159, 160) and (4) that by local law and Sections 32 and 34 of the Michigan Corporation Code, which governed the rights of the parties, even after termination of the voting trust by action of the Court or otherwise, the voting trust certificate holders and the Trustees had the right to continue

to vote such stock as might be voluntarily left with the Trustees by the certificate holders (140, 186).

Respondent Finan was tendered his stock in the course of the proceedings in exchange for his voting trust certificates, which he declined to accept (161, 169-171). He continued the proceedings obviously only for the purpose of depriving the other certificate holders of the benefit of the voting trust against the will of such other certificate holders and the voting trustees.

On April 9, 1948, the District Judge (Hon. Theodore Levin, successor to Judge Moinet) filed his opinion (175-178) which is not reported. Such opinion did not pass upon the legality of the extension, but, without notice that such action was being contemplated, (212) purported to exercise the reserved jurisdiction contained in the voting trust agreement giving the Court the right to terminate, and ordering the trust terminated because "it should no longer keep the Whittier Corporation under its guardianship" (177). The order of the District Judge entered April 22, 1948, (199-201) terminated the voting trust as of May 1, 1948.

The District Judge rejected the request of respondent Finan, that the order contain an injunction, enjoining the voting trustees from continuing to vote the stock after termination, upon the ground that so to do would be to invade "the province of another Court" (197). The District Judge recognized that the rights of the parties to the voting trust after termination were governed by state law, and that the Court would not presume to nullify the provisions of Sections 32 and 34 of the Michigan Corporation Code, providing that voting trustees have the right to continue voting stock in the voting trust after termination, until certificate holders receive and register their stock (198).

(E) Proceedings in Court of Appeals

All parties appealed to the Court of Appeals for the Sixth Circuit (202-203). The Court of Appeals filed its opinion on May 2, 1949. In such opinion the Court of Appeals held: (1) that the order entered in 1946 extending the voting trust was invalid as beyond the jurisdiction of the Court; (2) that the extension was in violation of the ten year limitation upon voting trusts contained in Section 34 of the Michigan Corporation Code; (3) that the District Judge had jurisdiction to terminate the voting trust; (4) that the District Judge erred in declining to enjoin the Voting Trustees from continuing to vote the stock in the voting trust after termination by the Court; and (5) that the case be remanded to the District Court for the entry of an order consonant with the opinion.

Such opinion, while holding the extension of the voting trust invalid under the ten year limitation of Section 34 of the Michigan Corporation Code, failed to even mention, let alone pass upon, petitioners' contention that the same Section 34, containing the ten year limitation, expressly provides that voting trustees shall have the right to continue to vote the stock after termination of the trust until certificate holders withdraw their stock and register the same. The opinion likewise failed to give any consideration to the fact argued by Petitioners in their briefs and on motion for rehearing that almost all of the remaining certificate holders had expressly consented to the extension and had had their voting trust certificates endorsed with a legend stating that same were subject to the terms of such extension agreement.

II.

STATUTES INVOLVED

The statutes involved are:

(1) Section 77 B of the Federal Bankruptcy Act and its later counterpart, Chapter X of the Chandler Bankruptcy Act.

(2) Section 32 of the Michigan Corporation Code (Mich. Ann. Stat., Par. 21.32) providing:

> "• • • such shareholders and only such shareholders as shall be stockholders of record on the date so fixed (by the Board of Directors) shall be entitled to such notice of and to vote at such meeting • • •."

(The full text of such section is set forth in the appendix hereof).

(3) Section 34 of the Michigan Corporation Code (Mich. Ann. Stat., Par. 21.34) providing:

> "• • • (voting trustees) may vote upon the shares so transferred during the period in such (voting trust) agreement specified and thereafter until those entitled to receive certificates of stock under such agreement shall have received the same."

(The full text of such section is set forth in the appendix hereof).

III.

BASIS OF JURISDICTION OF THIS COURT TO REVIEW

This Court has jurisdiction to review and to issue the writ of certiorari to the Court of Appeals under the Act of June 25, 1948 being Public Law 773 of the 80th Congress (2nd session) (28 U. S. C. A. 1254 (1)).

IV.

STATEMENT OF QUESTIONS PRESENTED AND REASONS FOR ALLOWANCE OF THE WRIT

The questions involved and the reasons why their importance requires the allowance of certiorari (amplified in the Brief filed herewith) may be briefly stated as follows:

1. Where a plan of reorganization is confirmed under Section 77B of the Bankruptcy Act (now Chapter X of the Chandler Act) and the securities provided for therein have been distributed, does the court in such bankruptcy proceedings have jurisdiction nine years after the confirmation and consummation of said plan of reorganization to terminate a voting trust agreement entered into pursuant to such plan of reorganization under a purported reservation of jurisdiction.

The court below held that it had such jurisdiction. Such holding is in direct conflict with the following decisions of the Court of Appeals for the Second Circuit, upon an important question of Federal Law:

(a) *In re Ambassador Hotel Corp.*, 124 Fed. 2d. 435, holding that where a voting trust was provided for in a plan of reorganization, and the securities distributed, that the Bankruptcy Court thereafter could not entertain any proceedings to determine the rights of the voting trust certificate holder to obtain his stock, but such rights could only be adjudicated in a state court of general jurisdiction, and that such proceedings should therefore be dismissed;

(b) *Reese v. Beacon Hotel Corp.*, 149 Fed. 2d. 610, holding that a petition to approve a lease pursuant to a plan of reorganization, must be dismissed because of lack

of jurisdiction in the Bankruptcy Court, notwithstanding such jurisdiction purportedly was reserved in the plan of reorganization, and the Court could neither approve or disapprove such lease;

(c) *Tower Hotel Corp. v. Lafayette National Bank*, 148 Fed. 2d. 145, holding a petition to approve a modification of a mortgage pursuant to purported reserved jurisdiction under the plan of reorganization must be dismissed because of lack of jurisdiction;

(d) *In re Flatbush Ave. v. Nevins Street Corp.*, 133 Fed. 2d 760, holding the Bankruptcy Court would exercise no power of supervision of a reorganized company even though power so to do was purportedly reserved in the plan of reorganization;

(e) *North American Car Corp. v. Peerless Corp.*, 143 Fed. 2d. 938, holding that a petition for an order to extend the time to exchange securities under a Plan of Reorganization should be denied as being contrary to the spirit of the rule forbidding continued exercise of jurisdiction by the Court over the reorganized corporation after the plan has been confirmed.

2. If the extension of the voting trust was invalid and the Bankruptcy Court had jurisdiction to determine the matter, may the Bankruptcy Court enjoin the trustees under the voting trust agreement from voting the stock remaining in the trust, voluntarily left with the trustees by the certificate holders after termination, in view of the express provisions of Sections 34 and 32 of the Michigan Corporation Code (Mich. Stat. Ann., Par. 21.32 and Par. 21.34) providing that voting trustees have the right to continue to vote the stock in the trust after termination until certificate holders actually receive their stock and register it on the books of the corporation and

prohibiting any one else from voting such stock in the meantime?

Although entered into pursuant to a plan of reorganization by the Bankruptcy Court the voting trust and the rights of the trustees and certificate holders thereunder were subject to all of the provisions of the Michigan Law. *Bakers Share Corp. v. London Terrace*, 130 F. (2d) 157-159; *In re Ambassador Hotel Corp.*, 124 R. (2d) 435. Indeed the court below applied to this particular voting trust the ten year limitation in Section 34 of the Michigan Corporation Code.

Section 32 of the Michigan Corporation Code (Mich. Stat. Anno. 21.32) provides that "• • • such shareholders and only such shareholders as shall be stockholders of record on the date so fixed (by the Board of Directors) shall be entitled to notice of and to vote at such meeting • • •."

Section 34 of the Michigan Corporation Code (Mich. Stat. Anno. 21.34) after providing for the issuance of stock to trustees under a stock trust agreement provides that such voting trustees "may vote upon the shares so transferred during the period in such (voting trust) agreement specified and thereafter until those entitled to receive certificates of stock under such agreement shall have received the same."

In directing the lower court to issue an injunction restraining the trustees from further voting the stock, the court directed the lower court to prohibit the trustees from exercising the rights plainly given by these two sections. No reason was given by the Court of Appeals for so doing. Although these two sections were repeatedly called to the attention of the District Court and the Court of Appeals and although the District Court had declined to issue such an injunction, the Court of Appeals

gave no reason in its opinion for denying the trustees and the certificate holders their statutory rights, and in its opinion the court made no mention of these sections in deciding that an injunction should issue.

While this section has not been construed by the Michigan Supreme Court on this point, its language is so plain and the rights conferred on trustees and certificate holders thereunder are so clearly set forth, that it would seem to require no interpretation. If, however, the Court of Appeals had any doubt as to the meaning or validity of these sections, its proper course was not to refuse to permit the exercise of rights so plainly given in the statute but to hold this case in abeyance pending the completion of appropriate proceedings in the state court for a determination of the meaning and effect of this statue. *Thompson v. Magnolia Petroleum Co.*, 309 U. S. 478, 484.

3. Does the action of the Court in terminating the rights of voting trust certificate holders to have their voting trustees continue to vote their stock, in a proceeding in which such certificate holders are not made parties and are permitted to participate only upon making an application for and being granted the right to intervene, deprive such certificate holders of their property without due process of law in violation of the Fifth Amendment of the Constitution of the United States?

The Court below ignored this question, although the same was distinctly and continuously presented. The taking away of such important property rights of certificate holders without affording them their day in Court and an opportunity to be heard is in violation of such amendment. *Powell v. Alabama*, 287 U. S. 45 (68); 77 L. Ed. 158 (170). In so holding the Court below so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Other subsidiary questions which should be reviewed are:

(a) Does a voting trust certificate holder, after he has lost his status by being tendered his stock pursuant to the power so to do contained in the voting trust agreement, have any right to challenge or have the Court pass upon the rights of other certificate holders and the trustees under such voting trust agreement.

(b) Does a voting trust certificate holder who makes no objection to an extension after notice thereof, estop himself from challenging the validity of such extension.

(c) Where a voting trust is voluntary and all certificate holders may obtain their stock with full voting rights upon their election, can one certificate holder compel other certificate holders to take their stock and revest themselves with such voting right where such certificate holders do not desire so to do, but desire to continue in such voting trust.

(d) Does the ten year Limitation on voting trusts in Section 34 of the Michigan Corporation Code (Mich. Stat. Ann., Par. 21.34) apply to an open, voluntary voting agreement where certificate holders have the unrestricted right to withdraw their stock from the trust at any time upon their own volition?

(e) If the amendment to the voting trust agreement was invalid because of lack of jurisdiction of the Court to approve the amendment, is such agreement valid as to beneficiaries who expressly and unconditionally consented to such amendment and extension under the law of the State of Michigan?

V.

Wherefore, the premises being considered, your petitioners pray that a writ of certiorari be granted, directed to the Court of Appeals for the Sixth Circuit, and that further proceedings be had thereon, for the purpose of reviewing the questions involved therein, as provided for by law.

FRANK W. BLAIR,
LOUIS H. CHARBONNEAU, and
LUCIUS TETER,
Trustees under Trust Agreement for Stock of Whittier Corporation dated as of May 1, 1938 and
WHITTIER CORPORATION,

By EDWARD T. GOODRICH,
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Detroit 26, Michigan.

HARRY W. JONES and
HAROLD M. SHAPERO,

By SAMUEL SHAPERO,
Their Attorney,
2525 Barlum Tower,
Detroit 26, Michigan.

Dated: July 8, 1949.

APPENDIX

MICHIGAN GENERAL CORPORATION ACT

Act 327, P. A. 1931, as amended

Sections 450.32 and 450.34 Comp. Laws Mich. 1948, Mich. Stat. Ann. §21.32 and §21.34.

Sec. 32. Voting rights; closing transfer books; elections of directors; cumulative voting, amendment of by-laws. In all elections for directors of any corporation organized under any general law of this state, other than municipal, insurance, banking corporations, non-profit corporations, industrial banking corporations, trust companies, building and loan associations, cooperative savings associations and summer resort associations, every stockholder entitled to vote shall have the right to vote in person or by proxy the number of shares of stock owned by him for as many persons as there may be directors to be elected, or to cumulate said shares and give 1 candidate as many votes as will equal the number of directors multiplied by the number of shares of his stock, or to distribute them on the same principle among as many candidates as he shall think fit. The entire number of directors to be elected shall be balloted for at 1 and the same time and not separately.

The board of directors shall have power to close the stock transfer books of the corporation for a period not exceeding 40 days preceding the original date fixed for any meeting of shareholders or the date for payment of any dividend or the date for the allotment of rights or the date when any change or conversion or exchange of capital stock shall go into effect: Provided, That in lieu of closing the stock transfer books as aforesaid, the by-

laws may fix or authorize the board of directors to fix in advance a date, not exceeding 40 days preceding the original date fixed for any meeting of shareholders, or the date for the payment of any dividend, or the date for the allotment of rights or the date when any change or conversion or exchange of capital stock shall go into effect, as a record date for the determination of the shareholders entitled to notice of, and to vote at, any such meeting, or entitled to receive payment of any such dividend, or to any such allotment of rights, or to exercise the rights in respect of any such change, conversion or exchange of capital stock, and in such case such shareholders and only such shareholders as shall be shareholders of record on the date so fixed shall be entitled to such notice of, and to vote at, such meeting, or to receive payment of such dividend, or to receive such allotment of rights, or to exercise such rights, as the case may be, notwithstanding any transfer of any stock on the books of the corporation or otherwise after any such record date fixed as aforesaid. Nothing in this section shall affect the rights of a shareholder and his transferee or transferor as between themselves.

Subject to the provisions of this act and to the provisions of the act under which any particular corporation is or shall have been formed in respect of the vote that shall be required for a specified action, the articles of any corporation may specify the number of shares and/or the amount of other securities having voting power the holders of which shall be present or represented by proxy at any meeting in order to constitute a quorum for, and the votes that shall be necessary for, the transaction of any business.

Sec. 34. Voting trusts. One or more shareholders may by agreement in writing deposit shares of the capital stock of any corporation, with or transfer shares of capi-

tal stock to any person or persons, or corporation or corporations, domestic or foreign, authorized to act as trustee or trustees, for the purpose of vesting in such person, persons, corporation or corporations the right to vote thereon, or for such other lawful purposes as may be agreed for any period of time determined by such agreement, not exceeding ten years, upon terms and conditions stated in such agreement, pursuant to which such person, persons or corporations shall act. After filing an unexecuted copy of such agreement in the registered office of the corporation in this state, which copy shall be open to the inspection of any shareholder of the corporation or any depositor under said agreement daily during business hours, the certificates for shares so transferred shall be surrendered and cancelled, and new certificates therefore shall be issued to such transferee or transferees, who may be designated voting trustees, and in the entry of such transferee or transferees as owners of such shares in the proper books of the issuing corporation that fact shall be noted, and thereupon said transferee or transferees may vote upon the shares so transferred during the period in such agreement specified and thereafter until those entitled to receive certificates of stock under such agreement shall have received the same. Shares standing in the name of such voting trustees, may be voted either in person or by proxy. In any case where two or more persons are designated as voting trustees and the right and method of voting any shares standing in their names at any meeting of the corporation are not fixed by the agreement appointing said trustees, the right to vote said shares and the manner of voting the same at any such meeting shall be determined by a majority of said trustees, or if they be equally divided as to the right and manner of voting the same in any particular case, the vote of said shares in such case shall be divided equally among said trustees.

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JOHN C. FINAN,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is filed in support of the "Statement of Questions Presented and Reasons for Allowance of the Writ," set forth in Section IV of the Petition for Writ of Certiorari.

I.

The District Court held (and the Court of Appeals affirmed) that the District Court, in proceedings for the reorganization of a debtor under Section 77-B of the Bank-

ruptcy Act, had jurisdiction, nine years after confirmation of the Plan of Reorganization and putting it into effect, to terminate, under a purported reservation of jurisdiction therein contained, a voting trust for stock of the new corporation created pursuant to the plan. This is in direct conflict with the decisions of the Court of Appeals of the Second Circuit.

It presents a question of Federal law of the utmost importance which has not been determined by this Court.

The right of a Bankruptcy Court in a reorganization proceeding to exercise jurisdiction over the parties to a reorganization in their conduct of the affairs of a corporation created pursuant to a plan of reorganization presents a question of utmost importance. In the period of approximately fifteen years, since Section 77-B was incorporated in the Bankruptcy Act many thousands of corporations have been reorganized under this section and its later counterpart, Chapter X of the Chandler Act, under plans of reorganization containing reservations of jurisdiction of many kinds. This case presents for determination the question of to what extent the Bankruptcy Court in a reorganization proceeding by reservations of jurisdiction in the plan may control the destinies of the thousands of reorganized corporations after a plan of reorganization has been confirmed and put into effect. It is common knowledge that many hundreds of millions of dollars worth of securities have been issued under plans of reorganization, and the jurisdiction of the Bankruptcy Court over such security holders issued on hundreds of millions of dollars worth of property are rendered uncertain if the principles followed in this case in the lower Court are not reviewed and adjudicated by this Court to be accepted as the law.

The Court of Appeals of the Second Circuit, which certainly in dollar volume of securities and property affected, and probably in a number of reorganizations consummated, exceeds that of any other circuit, has announced in several cases that after confirmation and consummation of a plan of reorganization, the Bankruptcy Court has no power or jurisdiction to determine the rights of the holders of voting trust certificates to withdraw their stock from a voting trust created pursuant to a plan of reorganization, confirmed by the Bankruptcy Court, and that such rights must be determined in a Court of general jurisdiction.

In *In re Ambassador Hotel Corporation*, 124 Fed. (2d) 435, the plan of reorganization provided for a voting trust which was to continue for a period of ten years. The form of the voting trust was approved by order of the court and the order approving the voting trust "reserved jurisdiction to determine any matters pertaining to the reorganization proceedings or to the consummation of the plan." Subsequent to this order the State of New York enacted a statute which limited voting trusts to a period of five years with certain exceptions not involved in that case. Upon the expiration of the five year period a certificate holder made demand on the trustees for his stock which was refused, and he brought an action in the state court for a judgment declaring that the voting trust had terminated at the expiration of the five year period. Motion to dismiss was made on the ground that any relief granted in that action would constitute an interference with the decree of the Bankruptcy Court. The proceedings in the state court were held in abeyance while the plaintiff made application to the District Court in the reorganization proceeding for an order for permission to continue his state court action and the voting

trustees moved in the District Court to enjoin the prosecution of the state court action. The District Court held that it lacked jurisdiction to determine or enforce the rights of the certificate holder asserted by him in his state court action, and denied the trustees' application for injunction. On appeal the Circuit Court of Appeals of the Second Circuit affirmed the decision of the lower court holding that where, in a reorganization proceeding, use is made of a corporation and a voting trust, the bankruptcy court may not enjoin state court proceedings unless they "challenge the validity of rights decreed by the federal court," and that corporations and voting trusts resulting from reorganization proceedings are subject to state law and rights created thereby are subject to determination only in appropriate plenary proceedings, and the Bankruptcy Court is without power or jurisdiction with respect thereto.

The principle of such lack of jurisdiction announced in *In re Ambassador Hotel Corporation* has been followed and approved by the same Court in other cases.

In *Reese v. Beacon Hotel Corporation,* 149 Fed. (2d) 610, the plan of reorganization reserved jurisdiction in the Court to pass upon and approve leases to be made by the reorganized corporation. Petition was filed to approve such a lease. The District Court approved the lease over the objection of a stockholder. The Court of Appeals held that the reservation of jurisdiction to approve leases was void and that therefore the Court had no power either to approve or to disapprove a lease, and remanded the case to the District Court with instructions to deny the motion for the approval of the lease for lack of jurisdiction.

In *Tower Hotel Corporation v. Lafayette National Bank,* 148 Fed. (2d) 145, a petition was filed for modification

of a mortgage provided for by a plan of reorganization. The Court of Appeals held that the District Court had no jurisdiction, both because jurisdiction had not been reserved, and also because any attempt to reserve such jurisdiction would have been void because it would "burden the Court with future supervision of the reorganized estate."

In *In re Flatbush Avenue-Nevin Street Corporation,* 133 Fed. (2d) 760, the same Court held that a Bankruptcy Court did not have jurisdiction to determine rights under a purported extension of a voting trust agreement entered into pursuant to a plan of reorganization, or to determine the rights dependent upon the "subsequent conduct" of the parties five years after the plan had been approved. The Court also said: "A Bankruptcy Court cannot obtain that power merely by inserting a provision reserving jurisdiction."

In *North American Car Corporation v. Peerless Corporation,* 143 Fed. (2d) 938, a petition was filed for an extension of the time within which bonds might be exchanged for new securities to be issued pursuant to the plan. The Court held that the petition should be denied because to grant it would be contrary to the spirit of the rule forbidding supervision of a reorganized company after the plan had been confirmed. In that case the Court said:

> "We have had occasion before to deplore the tendency of District Courts to keep reorganized concerns in tutelage indefinitely by orders purporting to retain jurisdiction for a variety of purposes, extending from complete superyision of the new business to modifications of detail in the reorganization. See *Clinton Trust Co. v. John H. Elliott Leather Co.,* 2 Cir., 132 F. 2d 299; *In re Flatbush Ave.-Nevin St. Corp.,* 2 Cir., 133 F. 2d 760; *Seedman*

v. Friedman, 2 Cir., 132 Fed. 2d 290. *Since the purpose of reorganization clearly is to rehabilitate the business and start it off on a new and to-be-hoped-for more successful career, it should be the objective of courts to cast off as quickly as possible all leading strings which may limit and hamper its activities and throw doubt upon its responsibility.*"

North American Car Corp. v. Peerless Corp., 143 Fed. (2d) 938.

Though reaching a result which, on superficial examination, might appear to be different, the Court of Appeals of the Second Circuit followed the same principle in *Bakers Share Corporation v. London Terrace, Inc.*, 130 Fed. (2d) 157. That case involved the same New York statute which was involved in *In re Ambassador Hotel*, 124 Fed. (2d) 435, limiting the term of voting trusts to five years. The voting trust in the Bakers Share case, like the voting trust in the Ambassador Hotel case, was to run for a term of ten years. The Court of Appeals pointed out that in the *Ambassador Hotel* case it had held that the Court had no jurisdiction to determine the effect of such statute on the right of certificate holders to withdraw their stock from the trust, despite a purported reservation of jurisdiction in the order approving the voting trust. In the Bakers Share case, however, the Court pointed out that the plan of reorganization there confirmed had anticipated the possibility that such statute would be passed, and had provided for an alternative right of security holders in such case and assumed jurisdiction only for the purpose of enforcing the right of security holders to the alternative securities provided for in the plan of reorganization. But in the *Bakers Share* case there was no abandonment of the principle so frequently announced by that Court that a Bankruptcy Court may not, under a purported reservation

of jurisdiction, exercise any control over the affairs of the reorganized corporation, or the holders of securities issued under the plan.

In the opinion in the case at bar, the Court of Appeals announced these principles and determined that they were applicable to the order of Judge Moinet approving the extension of the voting trust, but having passed that point, the Court of Appeals, as did the District Court, repudiated these principles when it held that the District Court had jurisdiction *sua sponte* to terminate the voting trust nine years after confirmation of the plan of reorganization, because jurisdiction so to do was reserved in the order approving the plan and the voting trust agreement. A clear case of conflict with the decisions of another circuit is thus here presented.

We do not deem it appropriate at this time to argue at length and in detail the error of the Court below on this point. We are merely pointing out that the Court below acted under the purported reservation of jurisdiction to terminate the trust, while at the same time holding that Judge Moinet committed a void act when he approved the amendment to the voting trust under a reservation of jurisdiction so to do.

II.

Assuming for the purpose of argument that the lower Court was correct in upholding the termination of the trust under the reserved jurisdiction so to do, the decision of the Court of Appeals that the trustees should therefore be enjoined from voting the stock in the trust, even though voluntarily left there by holders of voting trust certificates, not only violated the rule of lack of jurisdiction announced by the Second Circuit, *supra*, but is in direct conflict with the provisions of applicable Michigan law. Since the Plan of

Reorganization provided for a Michigan corporation and a voting trust in Michigan to hold the majority of the stock of such corporation for the period specified in the trust agreement, both the corporation and the voting trust became subject to the provisions of the Michigan Corporation Code with respect thereto.

Bakers Share Corporation v. London Terrace, Inc., 130 Fed. (2d) 157 (159).
In re Ambassador Hotel Corporation, 124 Fed. (2d) 435.

This principle was recognized in the opinion of the District Court (176) and was enforced by the Court of Appeals in holding that the extension of the trust violated the ten year limitation thereon in Section 34 of the Michigan Corporation Code. Although repeatedly called to the attention of the Court of Appeals in the original and reply briefs, and on motion for rehearing, the Court of Appeals failed to apply the Michigan law to the rights of the trustees to vote after termination, and the rights of certificate holders to leave their stock with the trustees and have the trustees vote their stock if they wished to do so. Sections 32 and 34 of the Michigan Corporation Code have been quoted in full as an appendix to our Petition for Writ of Certiorari. In substance these provide:

(1) That trustees under a voting trust agreement may vote the stock in the trust for the period specified in the trust agreement.

(2) That the trustees may continue to vote such stock after termination of the trust, until the certificate holders withdraw their stock from the trust and transfer it of record to their own names.

(3) That until such stock is so withdrawn and transferred, no one else may vote such stock.

Section 34 confers upon the trustees the right to vote, not only during the term of the agreement, but "and thereafter until those entitled to receive certificates of stock under such agreement shall have received the same." This is not only logical, but it is in strict accordance with the provisions of Section 32 of the Michigan Corporation Code, which provides that "such shareholders and only such shareholders" as are stockholders of record on the record date may vote, since the trustees are the holders of record until the stock is actually withdrawn from the trust and transferred on the books of the corporation to the certificate holders.

Ordinarily, where a question of local law is involved, an applicant for a writ of certiorari should show that the decision of the Court of Appeals is contrary to the decision of the Court of last resort of the state on the question involved. We are dealing here with a plain and unambiguous statute on which the Michigan Court has not had occasion to pass in connection with the point here involved, probably because the point is so plain. The language of the sections plainly prohibits the issuance of the injunction ordered in this case and we submit there is no room for interpretation. But if the Court of Appeals was in doubt about the correctness of the interpretation placed by us on the language of these sections, its proper course was not to disregard these sections and to deprive petitioners and certificate holders of the rights which seem to be so plainly given thereby, but to hold the matter in abeyance until an interpretation of these sections could be obtained from the Michigan Court in an appropriate proceeding.

> "Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have, by the accident of

Federal jurisdiction, been determined contrary to the law of the state which, in such matters, is supreme."

Thompson v. Magnolia Petroleum Co., 309 U. S. 478 (484).

To the same effect are:

Railroad Commission of Texas v. Pullman Co., 312 U. S. 496 (500-502).

American Federation of Labor v. Watson, 327 U. S. 582.

The Michigan law provides several methods by which an interpretation of this section could be speedily obtained in the Michigan Courts. One of these is similar to the method pointed out by this Court in *American Federation of Labor v. Watson*, 327 U. S. 582, to which we have just referred—the Michigan Declaratory Judgment Law, Act 36 Michigan Public Acts 1929 (Sec. 691.501 C. L. Mich. 1948 *et seq.*, Mich. Stat. Ann. par. 27.501, *et seq.)*

While the opinion of the Court of Appeals in the case at bar did not give the reasons that prompted the Court to order the issuance of an injunction, the Court was apparently influenced by the argument of Mr. Finan's counsel (unsupported by any authority) that the voting trustees provided for in a plan of reorganization are "officers of the Court," are the "Court's trustees," and that therefore the Court had power to direct their activities and to prohibit them from carrying on the functions of trustees.

This same theory may have been in the mind of the District Court when it said that the Court should give up control over the reorganized corporation by terminat-

ing the voting trust. But these reasons are based on a complete misconception of the nature of the trust herein involved, and the character of the trustees thereunder. This voting trust was created pursuant to the plan of reorganization to hold certain stock of the reorganized corporation. It was not the creature of the Court. It was the result of a contract entered into by the former creditors and shareholders of the debtor. It was *expressly* consented to in writing by more than two-thirds in amount of the creditors, and more than a majority in amount of the shareholders. It was as much a part of the plan of reorganization as was Whittier Corporation.

The Court of Appeals said that as a practical matter, creditors and shareholders were compelled by circumstances to accept a voting trust. If this is correct, this compulsion was a compulsion of their judgment and not a compulsion of the Court. Moreover, since May 1, 1942, no certificate holder has been compelled to permit his stock to remain in the trust, regardless of whether or not he actually consented to the plan of reorganization, or if so, his reasons for so doing.

Except in the case of unusual situations such as a mortgage or sale of the hotel, or of the stock in the trust, the trust agreement did not purport to confer rights on the Court to direct the manner of voting by the trustees. The first Board of Directors of the new corporation was to consist of five members, approved by the Court. The trust agreement provided that trustees might be removed and successors appointed by the holders of a majority in amount of the trust certificates, and there was no requirement that the Court approve such appointment of successors (65). Nowhere in the plan of reorganization, or in the voting trust agreement, was any power given to the Court to control or in any manner to interfere with

the election of directors to manage the reorganized corporation.

In *United States v. Columbia Gas and Electric Corporation,* 27 Fed. Supp. 116, the Court held that where a decree entered under the Anti-Trust laws provided that certain stock owned by defendant should be transferred to the name of a person selected by the Court as a voting trustee to hold the stock and vote it so that the defendant could not control the corporation issuing such stock, such trustee was not an officer of the Court, and that the stock held by him as such trustee was not "in the custody of the Court or of an officer thereof."

In *In re Chicago and Northwestern Railway Company,* 35 Fed. Supp. 230, a plan for the reorganization of the railroad under Section 77 of the Bankruptcy Act provided for a voting trust to hold certain stock of the reorganized company. The plan provided that the original trustees and their successors were to be selected by various classes of creditors, and no provision was made for approval by the Court of any such appointment. In approving the plan of reorganization, the Court said:

> "The Court finds that the power of appointment of the voting trustees is lodged in proper hands."

If voting trustees under a plan of reorganization under the Bankruptcy Act are officers of the Court, it seems strange that such trustees might be appointed without any approval of the Court being required, but merely as a matter of agreement between the creditors.

In *In re President Realty Company,* 67 Fed. Supp. 390, a voting trust was created pursuant to a plan of reorganization under Section 77-B of the Bankruptcy Act. These trustees presented to the Court a petition for advice and instructions with respect to a proposed sale of the prop-

erty, alleging that certain conditions had occurred which made it necessary to alter the provisions of the voting trust, application having been made under a purported reservation of jurisdiction in the order confirming the plan. After holding that the reservation of jurisdiction was not broad enough in its terms to include jurisdiction over the petition filed, the Court held that if such jurisdiction had been reserved, the reservation would have been invalid under the Bankruptcy Act, quoting the following language from *In re Ambassador Hotel Corporation,* 124 Fed. (2d) 435:

> "When the court confirmed a plan of reorganization which set up a New York corporation with stock issued to voting trustees, it used a tool created under and subject to state laws. The future fate of the corporation was not within the control of the bankruptcy court, nor could that court reserve power to adjudicate controversies in which it might become involved—whether they should arise from a change in state law or from the corporation's own conduct, * * * But the bankruptcy court by confirming a plan of reorganization does not guarantee that the plan will be carried out regardless of what may befall the new corporation; nor does it have ancillary jurisdiction to control litigation respecting future events which may affect the new corporation's ability to carry out the plan."

These cases indicate quite plainly that a voting trust created pursuant to a plan of reorganization is not "the Court's own trust," and that the trustees thereunder are not "officers of the Court." The trust is a part of the plan of reorganization and as such is no more subject to control by the Court than is the corporation itself, and the trustees are no more subject to control by the Court than are the officers or directors of the reorganized corporation. In terminating the trust the District Court was not giving

up control over the corporation; it was exercising control. And in directing that the trustees be enjoined from voting the stock in the trust, the Court of Appeals was not terminating authority of the Court's trustees; it was depriving certificate holders of the rights guaranteed them by the Michigan statute. If, as the Court of Appeals held, the power of the District Court to "extend" the voting trust was limited by the ten year provision of Section 34 of the Michigan Corporation Code, how can it be said that the right to vote after termination, granted by the same Section 34, does not equally limit the right of the Court to enjoin the trustees from voting in accordance with the rights given such voting trustees in the same statute.

III.

The opinion of the District Court directing the entry of an order terminating the trust under the purported reservation of jurisdiction so to do, was entered without notice to anyone, trustees, certificate holders, or anyone else, that the Court was considering the termination of the trust, and without the Court's having been asked to do so (212). No interested party was given any opportunity to be heard thereon before the opinion was filed. Such action on the part of the District Court was clearly a deprivation of property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

In *Powell v. Alabama,* 287 U. S. 45 (68); 77 L. ed. 158 (170); the Court said:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitu-

tional requirement of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multiude of decisions. In *Holden v. Hardy,* 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 S. Ct. 383, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin v. Page,* 18 Wall. 350, 368, 369, 21 L. ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so."

See also:

Beck v. Occidental Life Ins. Co., (C. C. A. 10), 95 F. 2d 935 (937), certiorari denied, 305 U. S. 603, 83 L. ed. 383; 59 S. Ct. 63; and

Wise v. Herzog, U. S. C. A. Dist. of Col. 114 F. 2d 486 (488).

CONCLUSION

We respectfully submit that the Writ of Certiorari should issue.

Respectfully submitted,

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